
HOUSE BILL 2360

State of Washington

57th Legislature

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By Representatives Conway, Campbell, Cody, Edwards, Wood and Schual-Berke

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1 AN ACT Relating to the regulation of negotiations between health
2 providers and health carriers; amending RCW 43.72.300 and 43.72.310;
3 adding a new section to chapter 43.72 RCW; and creating a new section.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 **Sec. 1.** RCW 43.72.300 and 1997 c 274 s 6 are each amended to read
6 as follows:

7 (1) The legislature recognizes that competition among health care
8 providers, facilities, payers, and purchasers will yield the best
9 allocation of health care resources, the lowest prices for health care
10 services, and the highest quality of health care when there exists a
11 large number of buyers and sellers, easily comparable health plans and
12 services, minimal barriers to entry and exit into the health care
13 market, and adequate information for buyers and sellers to base
14 purchasing and production decisions. ~~((However))~~ The legislature
15 further recognizes, however, that managed competition may be adversely
16 affecting the supply of health care providers in this state. The
17 provision of health services by health care providers in participating
18 provider agreements with health carriers, while resulting in health
19 cost containment, is leading to a flight of these providers to other

1 areas of the country where bureaucratic demands on practices are less
2 cumbersome and reimbursement levels are noticeably higher, causing a
3 serious drain on the supply of health care providers available for
4 servicing patients and otherwise threatening public access to health care
5 services in the state. As the marketplace of health carriers tends to
6 be more concentrated than the market for health care providers, there
7 is often a disparity of bargaining power between them, resulting in a
8 dramatic disadvantage of health care providers in their efforts to
9 negotiate the terms and conditions of their contracts with health
10 carriers. This inequality of bargaining power is exacerbated by the
11 absence of a health carrier's obligation to bargain in good faith. The
12 prohibition under current law to negotiate appropriate reimbursement
13 levels forces health care providers to either accept the contract
14 proposals offered by health carriers or seek more acceptable terms
15 available in other states. The requirement of good faith negotiations
16 is a recognized and proven process for inducing parties in dispute to
17 resolve their differences professionally with accommodations resulting
18 in their mutual benefit. In addition, the legislature finds that
19 purchasers of health care services and health care coverage do not have
20 adequate information upon which to base purchasing decisions; that
21 health care facilities and providers of health care services face legal
22 and market disincentives to develop economies of scale or to provide
23 the most cost-efficient and efficacious service; that health insurers,
24 contractors, and health maintenance organizations face market
25 disincentives in providing health care coverage to those Washington
26 residents with the most need for health care coverage; and that
27 potential competitors in the provision of health care coverage bear
28 unequal burdens in entering the market for health care coverage.

29 (2) The legislature further finds that the regulation of health
30 insurance by whatever means authorized by state law is within the
31 sovereign and constitutional powers of state government to further its
32 interests in protecting the health, safety, and welfare of the people
33 of the state, and includes regulating the procedures under which health
34 carriers negotiate the terms and conditions of contracts for health
35 care provider services, including reimbursement for these services.
36 The legislature therefore intends to exempt from state anti-trust laws,
37 and to provide immunity from federal anti-trust laws through the state
38 action doctrine for collective negotiations by health care providers
39 with health carriers, including customary communications between health

1 care providers with those negotiating for them to inform and advance
2 the negotiations with other activities approved under this chapter that
3 might otherwise be constrained by such laws and intends to displace
4 competition in the health care market: To contain the aggregate cost
5 of health care services; to promote the development of comprehensive,
6 integrated, and cost-effective health care delivery systems through
7 cooperative activities among health care providers and facilities; to
8 promote comparability of health care coverage; to improve the cost-
9 effectiveness in providing health care coverage relative to health
10 promotion, disease prevention, and the amelioration or cure of illness;
11 to assure universal access to a publicly determined, uniform package of
12 health care benefits; and to create reasonable equity in the
13 distribution of funds, treatment, and medical risk among purchasers of
14 health care coverage, payers of health care services, providers of
15 health care services, health care facilities, and Washington residents.
16 To these ends, any lawful action taken pursuant to (~~chapter 492, Laws~~
17 ~~of 1993~~) this section and RCW 43.72.310 by any person or entity
18 created or regulated (~~by chapter 492, Laws of 1993~~) under these
19 sections are declared to be taken pursuant to state statute and in
20 furtherance of the public purposes of the state of Washington.

21 (3) The legislature does not intend and, unless explicitly
22 permitted in accordance with this section and RCW 43.72.310 or under
23 rules adopted (~~pursuant to chapter 492, Laws of 1993~~) under these
24 sections, does not authorize any person or entity to engage in
25 activities or to conspire to engage in activities that would constitute
26 per se violations of state and federal anti-trust laws including but
27 not limited to conspiracies or agreements:

28 (a) Among competing health care providers not to grant discounts,
29 not to provide services, or to fix the price of their services;

30 (b) Among health carriers as to the price or level of reimbursement
31 for health care services;

32 (c) Among health carriers to boycott a group or class of health
33 care service providers;

34 (d) Among purchasers of health plan coverage to boycott a
35 particular plan or class of plans;

36 (e) Among health carriers to divide the market for health care
37 coverage; or

38 (f) Among health carriers and purchasers to attract or discourage
39 enrollment of any Washington resident or groups of residents in a

1 health plan based upon the perceived or actual risk of loss in
2 including such resident or group of residents in a health plan or
3 purchasing group.

4 **Sec. 2.** RCW 43.72.310 and 1997 c 274 s 7 are each amended to read
5 as follows:

6 (1) A health carrier, health care facility, health care provider,
7 or other person involved in the development, delivery, or marketing of
8 health care or health plans may request, in writing, that the
9 department of health obtain an informal legal opinion from the attorney
10 general as to whether particular conduct is authorized by (~~chapter~~
11 ~~492, Laws of 1993~~) this section and RCW 43.72.300. Trade secret or
12 proprietary information contained in a request for informal opinion
13 shall be identified as such and shall not be disclosed other than to an
14 authorized employee of the department of health or attorney general
15 without the consent of the party making the request, except that
16 information in summary or aggregate form and market share data may be
17 contained in the informal opinion issued by the attorney general. The
18 attorney general shall issue such opinion within thirty days of receipt
19 of a written request for an opinion or within thirty days of receipt of
20 any additional information requested by the attorney general necessary
21 for rendering (~~an~~) a legal opinion unless extended by the attorney
22 general for good cause shown. If the attorney general concludes that
23 such conduct is not authorized by (~~chapter 492, Laws of 1993~~) this
24 section and RCW 43.72.300, the person or organization making the
25 request may petition the department of health for review and approval
26 of such conduct in accordance with subsection (3) of this section.

27 (2) After obtaining the written legal opinion of the attorney
28 general and consistent with such opinion, the department of health:

29 (a) May authorize conduct by a health carrier, health care
30 facility, health care provider, or any other person that could tend to
31 lessen competition in the relevant market upon a strong showing that
32 the conduct is likely to achieve the policy goals of (~~chapter 492,~~
33 ~~Laws of 1993~~) this section and RCW 43.72.300 and a more competitive
34 alternative is impractical;

35 (b) Shall adopt rules governing conduct among providers, health
36 care facilities, and health carriers including rules governing provider
37 and facility contracts with health carriers, rules governing the use of
38 "most favored nation" clauses and exclusive dealing clauses in such

1 contracts, and rules providing that health carriers in rural areas
2 contract with a sufficient number and type of health care providers and
3 facilities to ensure consumer access to local health care services;

4 (c) Shall adopt rules permitting health care providers within the
5 service area of a plan to collectively negotiate all the terms and
6 conditions of contracts, including reimbursement for provider services,
7 with a health carrier ((including)). The rules must include the
8 ability of providers to meet and communicate for the purposes of these
9 negotiations, a requirement for representatives of health care
10 providers and health carriers to negotiate in good faith, and options
11 for voluntary mediation or arbitration in case of impasse. The rules
12 must provide for the exclusion of agencies and subdivisions of the
13 state of Washington from the requirements of this subsection. For the
14 purpose of collective negotiation under this act, health care providers
15 include those health care practitioners regulated under Title 18 RCW by
16 the department of health to practice health or health-related services
17 or otherwise practicing health care services in this state consistent
18 with state law;

19 (d) Shall adopt rules governing cooperative activities among health
20 care facilities and providers; and

21 (e) Effective July 1, 1997, in addition to the rule-making
22 authority granted to the department under this section, the department
23 shall have the authority to enforce and administer rules previously
24 adopted by the health services commission and the health care policy
25 board pursuant to RCW 43.72.310.

26 (3) A health carrier, health care facility, health care provider,
27 or any other person involved in the development, delivery, and
28 marketing of health care services or health plans may file a written
29 petition with the department of health requesting approval of conduct
30 that could tend to lessen competition in the relevant market. Such
31 petition shall be filed in a form and manner prescribed by rule of the
32 department of health.

33 The department of health shall issue a written decision approving
34 or denying a petition filed under this section within ninety days of
35 receipt of a properly completed written petition unless extended by the
36 department of health for good cause shown. The decision shall set
37 forth findings as to benefits and disadvantages and conclusions as to
38 whether the benefits outweigh the disadvantages.

1 (4) In authorizing conduct and adopting rules of conduct under this
2 section, the department of health with the advice of the attorney
3 general, shall consider the benefits of such conduct in furthering the
4 goals of health care reform including but not limited to:

5 (a) Enhancement of the quality of health services to consumers;

6 (b) Gains in cost efficiency of health services;

7 (c) Improvements in utilization of health services and equipment;

8 (d) Avoidance of duplication of health services resources; or

9 (e) And as to (b) and (c) of this subsection: (i) Facilitates the
10 exchange of information relating to performance expectations; (ii)
11 simplifies the negotiation of delivery arrangements and relationships;
12 and (iii) reduces the transactions costs on the part of health carriers
13 and providers in negotiating more cost-effective delivery arrangements.

14 These benefits must outweigh disadvantages including and not
15 limited to:

16 (i) Reduced competition among health carriers, health care
17 providers, or health care facilities;

18 (ii) Adverse impact on quality, availability, or price of health
19 care services to consumers; or

20 (iii) The availability of arrangements less restrictive to
21 competition that achieve the same benefits.

22 (5) Conduct authorized by the department of health shall be deemed
23 taken pursuant to state statute and in the furtherance of the public
24 purposes of the state of Washington.

25 (6) With the assistance of the attorney general's office, the
26 department of health shall actively supervise any conduct authorized
27 under this section to determine whether such conduct or rules
28 permitting certain conduct should be continued and whether a more
29 competitive alternative is practical. The department of health shall
30 periodically review petitioned conduct through, at least, annual
31 progress reports from petitioners, annual or more frequent reviews by
32 the department of health that evaluate whether the conduct is
33 consistent with the petition, and whether the benefits continue to
34 outweigh any disadvantages. If the department of health determines
35 that the likely benefits of any conduct approved through rule,
36 petition, or otherwise by the department of health no longer outweigh
37 the disadvantages attributable to potential reduction in competition,
38 the department of health shall order a modification or discontinuance
39 of such conduct. Conduct ordered discontinued by the department of

1 health shall no longer be deemed to be taken pursuant to state statute
2 and in the furtherance of the public purposes of the state of
3 Washington.

4 (7) Nothing contained in chapter 492, Laws of 1993 is intended to
5 in any way limit the ability of rural hospital districts to enter into
6 cooperative agreements and contracts pursuant to RCW 70.44.450 and
7 chapter 39.34 RCW.

8 (8) The secretary of health shall from time to time establish fees
9 to accompany the filing of a petition or a written request to the
10 department to obtain ((an)) a legal opinion from the attorney general
11 under this section and for the active supervision of conduct approved
12 under this section. Such fees may vary according to the size of the
13 transaction proposed in the petition or under active supervision. In
14 setting such fees, the secretary shall consider that consumers and the
15 public benefit when activities meeting the standards of this section
16 are permitted to proceed; the importance of assuring that persons
17 sponsoring beneficial activities are not foreclosed from filing a
18 petition under this section because of the fee; and the necessity to
19 avoid a conflict, or the appearance of a conflict, between the
20 interests of the department and the public. The total fee for a
21 petition under this section, a written request to the department to
22 obtain ((an)) a legal opinion from the attorney general, or a
23 combination of both regarding the same conduct shall not exceed the
24 level that will defray the reasonable costs the department and attorney
25 general incur in considering a petition and in no event shall be
26 greater than twenty-five thousand dollars. The fee for review of
27 approved conduct shall not exceed the level that will defray the
28 reasonable costs the department and attorney general incur in
29 conducting such a review and in no event shall be greater than ten
30 thousand dollars per annum. The fees shall be fixed by rule adopted in
31 accordance with the provisions of the administrative procedure act,
32 chapter 34.05 RCW, and shall be deposited in the health professions
33 account established in accordance with RCW 43.70.320.

34 NEW SECTION. **Sec. 3.** A new section is added to chapter 43.72 RCW
35 to read as follows:

36 The insurance commissioner may, subject to a hearing if one is
37 demanded, revoke, suspend, or refuse to accept or renew registration
38 from any health carrier, issue a cease and desist order, or bring an

1 action in any court of competent jurisdiction to enjoin a health
2 carrier from doing any further business in this state, if the health
3 carrier violates the provisions of RCW 43.72.310(2)(c) or any rules
4 promulgated under that subsection. After hearing or upon stipulation
5 by the registrant and in addition to or in lieu of the suspension,
6 revocation, or refusal to renew any registration of a health carrier,
7 the commissioner may levy a fine against the party involved for each
8 offense in an amount not less than ten thousand dollars. The order
9 levying the fine shall specify the period within which the fine shall
10 be fully paid. The period shall not be less than thirty days from the
11 date of the order. Upon failure to pay any fine when due, the
12 insurance commissioner shall revoke the registration of the health
13 carrier, and the fine shall be recovered in a civil action brought in
14 behalf of the commissioner by the attorney general. Any fine collected
15 shall be paid by the commissioner to the state treasurer for deposit in
16 the general fund.

17 NEW SECTION. **Sec. 4.** This act is remedial in nature and shall be
18 construed to effect the purposes expressed in section 1 of this act.

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